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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

STATE OF TEXAS

Petitioner,

v.

JESSIE BROOKS

Respondent,

On Petition for Discretionary Review from the Third Court of Appeals in Cause No. CR25688 from the 20th District Court, Milam County, Texas

RESPONDENT'S SUPPLEMENTAL BRIEF ON SINGLE ISSUE ARTICULATED BY THE COURT

ORAL ARGUMENT REQUESTED

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STATEMENT CONCERNING ORAL ARGUMENT

Oral argument not granted.

TABLE OF CONTENTS

PROCEDURAL HISTORY

On September 14, 2017, Mr. Brooks was indicted for the offense of Aggravated Assault with a Deadly Weapon with the indictment specifying that Mr. Brooks, "did then and there intentionally or knowingly threaten Lisa Grayson, a member of the defendant's family or household or with whom the defendant had a dating relationship, with imminent bodily injury by telling her that he was going to end her life, and the defendant did use or exhibit a deadly weapon…" (C.R., 5).

On May 25, 2018, the State filed a Notice of Intent to Amend Indictment and remove the words "by telling her that he was going to end her life" and stated in the Notice that this language was "superfluous language that is not needed." However, the State never actually amended the Indictment and trial proceeded on the original indictment.

On August 8, 2018, Mr. Brooks was convicted by a jury of Aggravated Assault with a Deadly Weapon. (C.R., 103).

A sentencing hearing before the Judge was set for October 4, 2018. (C.R., 111)

On October 26, 2018, a Judgment was entered which reflected a conviction for a 1st Degree Felony and a plea of True to the enhancements. The judgment also assessed a 30-year sentence in the Institutional Division of TDCJ and $279.00 in court costs. (C.R., 118).

On November 13, 2018, Mr. Brooks filed a Motion for New Trial. (C.R., 126).

On November 13, 2018, Mr. Brooks also filed a Notice of Appeal. (C.R., 130).

On November 14, 2018, the Court denied Mr. Brook' Motion for New Trial. (C.R., 129).

On July 3, 2020, the 3rd Court of Appeals reversed the Trial Court's order and rendered acquittal.

On September 8, 2020, the State filed a PDR.

On November 11, 2020, the Court of Criminal Appeals granted the State's Petition for Discretionary Review.

On December 14, 2020 Respondent was notified that the State's brief had been received. Respondent's brief was due on January 14, 2021.

On January 15, 2021 Respondent filed it's brief with permission of the Court.

On June 9, 2021 the Court of Appeals requested supplemental briefs on the sole issue of whether "I need to hit" constituted a verbal threat.

On June 29, 2021 the State filed its brief.

Respondent's brief is due July 28, 2021.

INDEX OF AUTHORITIES

Cases

State:

Federal:

STATEMENT OF THE CASE

The 3rd Court of Appeals correctly held that the phrase "I need to hit" did not constitute a verbal threat in this case. This court has asked for supplemental briefs as to whether the phrase "I need to hit" could ever be a verbal threat.

ISSUE PRESENTED

I. Does the statement "I need to hit," constitute a verbal threat?

STATEMENT OF FACTS

On September 14, 2017, Brooks was indicted for the offense of Assault Impeding Breath of a Family Member and Aggravated Assault with a Deadly Weapon with the indictment specifying that Brooks, "did then and there intentionally or knowingly threaten Lisa Grayson, a member of the defendant's family or household or with whom the defendant had a dating relationship, with imminent bodily injury by telling her that he was going to end her life, and the defendant did use or exhibit a deadly weapon… " (C.R., 5).

Grayson could not explain what caused this attack, maintaining, in fact, that she "didn't even talk to him" and did not "recall talking to him" before it happened. (4 R.R. 164; 190) (7 R.R. Def. Ex. 9) (10:10 or so (does not know why Appellant "tripped" but suspects jealousy because she received money from her "baby daddy") and at 15:00 or so (saying the incident "just happened")). Grayson testified that Brooks first grabbed the victim's neck *and then* started hitting the victim with a board. (emphasis added) R.R. Vol. 4 P. 57. Grayson told Brooks that he was hurting her and only then did he reply with the statement "I need to hit." R.R. Vol. 4 P. 57. After the incident, Grayson was pulled over and her roadside interview was recorded on an officer's bodycam. (7 R.R. Def. Ex. 9). During this interview she never mentioned that Brooks either threatened her or that he made a

non-verbal threat before attacking her. (7 R.R. Def. Ex. 9). Her written statement, in pertinent part, was that Brooks

> "… grad my neck start choching me so hard I couldn't Breath the he grad A Board start hitting me wit it so hard I told Jessie that he was hurting me so he told me I need to Hit. So he kept Hittin me with the Board the After tha he start hittin my fingurs till they Stard Bleeding."

Over the objection of defense counsel, the jury charge did not track the elements of an assault by threat.

Brooks was acquitted of the Assault Impeding Breath of a Family Member charge but was convicted of the Aggravated Assault by threat with a Deadly Weapon. (5 R.R., 139.) Brooks went to the Judge for punishment and was sentenced to 30 years in the Institutional Division of TDCJ. (C.R. 118).

Brooks appealed on four issues, however, the State conceded Issue 4. (4 R.R. 160; 163-165). The State has only briefed Issue 1 for this PDR.

The Court of Criminal Appeals has asked for supplemental briefing on the sole question of whether the statement "I need to hit" constituted a verbal threat.

STANDARD OF REVIEW

When reviewing the sufficiency of the evidence, "evidence is considered sufficient to support a conviction when after considering all the evidence in the light most favorable to the prosecution, a reviewing court concludes that any rational trier of fact could have fond the essential elements of the offense beyond a reasonable doubt." *Hernandez v. State*, 556 S.W.3d 308, 315 (Tex. Crim. App. 2017); *Hooper v. State,* 214 S.W. 3d 9, 13 (Tex. Crim. App. 2007). When reviewing "all the evidence," the reviewing court must look at evidence that was both properly and improperly admitted and presume that the trier of fact resolved any conflicts in favor of the prosecution and thus uphold the conviction. *Conner v. State,* 76 S.W.3d 192, 197 (Tex. Crimp. App. 2001); *Jackson v. Virginia*, 443 U.S. 307, 318-19, (1979). However, even in deferring to the prosecution in this manner, a verdict cannot be sustained if the factfinder's belief in the evidence is irrational in light of the rest of the evidence. *Brooks v. State*, 323 S.W.3d 893, 907 (Tex. Crim. App. 2010).

SUMMARY OF THE ARGUMENT

ISSUE 1*: *The phrase "I need to hit" may or may not constitute a verbal threat depending on the context of the statement and the individual facts of the case at bar.

The 3rd Court of Appeals held that the evidence was insufficient to convict Brooks because "there was a material variance between the indictment, which alleged the offense of assault by threat, specifically that Brooks threatened Grayson "by telling her that he was going to end her life," and the evidence at trial. The 3rd Court of Appeals found that the phrase "I need to hit" was, at most, a "mere preparation toward verbally threatening" Grayson. The Court based this conclusion on the totality of the testimony and exhibits presented in this case.

The short answer to the Court's question; does the phrase "I need to hit" constitute a verbal threat, is the oft repeated phrase in the legal field, "it depends."

ARGUMENT

I. Verbal Threats

It is well settled that a threat can be verbal or non-verbal. A verbal threat can be alleged under the statute as can a non-verbal threat, which makes each type of threat a "distinguishable discrete act." *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) (quoting *Ex Parte Cavazos*, 203 S.W.3d 333, 336 (Tex. Crim. App. 2006)).

Whether or not an utterance is a threat depends on the context of each case and whether the words "constitute unambiguous threats of imminent bodily injury from the objective perspective of a reasonable person." *Jones v. Shipley*, 508 S.W.3d 766, 770 (Tex.App.—Houston [1st Dist.] 2016. In *Jones*, the court examined several cases with verbal threats to parse out what constituted unambiguous language. In all of the following cases the threat language was found to be unambiguous. For example, in *Wells v. May*, No. 05-12-01100- CV, 2014 WL 1018135 (Tex.App.—Dallas 2014, no pet.)(mem. op.), pgs 2-4 the record reflected actual death threats with May screaming "I'm gonna kill you!" and telling Wells that he was going to shoot him with his gun. In *Pickens v. Fletcher*, No. 4:12-CV-1196, 2013 WL 2618037 (S.D. Tex. June, 2013), p. 2 the defendant made an express death threat saying "I will kill you n*****!" and then went to his vehicle to get a gun that he pointed at the victim. In *Wilson v. State*, 391 S.W.3d 131, 134 (Tex.App.—

Texarkana 2012, no pet.) the defendant told his father that he would "knock the shit out of him," and then struck him on the head and back. In *Tidwell v. State*, 187 S.W.3d 771, 775 (Tex.App.—Texarkana 2006, pet. stricken), the defendant had a gun and told the victim that "unless he left, she would shoot him."

In contrast, Jones also looked at a case in which the utterances were not considered verbal threats. In *Texas Bus Lines v. Anderson*, 233 S.W.2d 961 (Tex.Civ.App.—Galveston 1950, writ ref'd n.r.e.), an altercation between a bus driver and Anderson resulted in the bus driver telling Anderson and a friend that "You can't ride on my bus under any circumstances-- neither of you sons of bitches can ride my bus under any circumstances." *Id* at 963 The driver then braced himself on the bus stairs and prepared to kick Anderson in the face if he attempted to board the bus. *Id*.

It is interesting to note that in all the cases in which a verbal threat was found, the utterance comes ***before*** the assault. Respondent is unable to locate a case in which a defendant was convicted for assault by threat for an utterance that occurs after the assault. Additionally, as the *Texas Bus Lines* case illustrates, not all angry utterances constitute a verbal assault, even with postures that indicate violence might occur.

II. Context

The State contends that statements must be taken in context when making a threat analysis. State's Brief p.3, ¶ 3-4. Respondent could not agree more. The State points to *Hart v. State*, 89 S.W. 3rd 61, 64 (Tex.Crim. App. 2002) (applying inferences based on acts, words, and conduct to the mens rea of the alleged crime) as support for the notion that acts, words, and conduct can all be considered when determining guilt. However, *Hart* clearly shows us that even when some evidence points in a particular direction that does not mean that it rises to the level required by the statute. *Id at* 62. In *Hart*, the defendant was convicted of engaging in organized crime by participating in the theft of a Land Cruiser with others who were in an auto theft ring. *Id at 64-66*. Although the defendant participated in the theft of the Land Cruiser with the theft ring, and most surely was guilty of theft, there was not enough evidence to prove that he was part of the organized theft ring itself, even though he was acquainted with persons in the theft ring. Further, the defendant met with persons in the theft ring several times to plan the theft of the Land Cruiser. This Court held that although the evidence was sufficient to support a conviction of theft, it was insufficient to support a conviction for engaging in organized criminal activity because no evidence was offered to show that the defendant intended to join an auto theft ring. The evidence merely showed that he intended to steal a Land Cruiser. *Id at 66*. The State cannot simply bootstrap one crime into another because it

is similar or because the State makes leaps of inference. The State must still present evidence to prove the case.

III. Application to the case at bar

In the case at bar, the evidence clearly shows that Brooks physically assaulted Grayson. Simply because words were uttered doesn't mean those words are automatically a verbal threat. But more than that, **when** the words occur has a bearing on the context. As shown in the multitude of cases above, there is not a single case that Respondent could find in which a defendant was convicted of making a verbal threat after the assault occurs.

The State offered no nexus to connect the utterance "I need to hit" to a verbal assault. But applying the State's context argument, there are different ways to interpret the utterances. Grayson testified to the following:

> "… grad my neck start choching me so hard I couldn't Breath the he grad A Board start hitting me wit it so hard I told Jessie that he was hurting me so he told me I need to Hit. So he kept Hittin me with the Board the After tha he start hittin my fingurs till they Stard Bleeding."

A close look at the style of Grayson's writing; her spelling, grammar, syntax, punctuation, and words left out make it very difficult to read. An alternate

understanding of the exchange is that he could have been telling her to hit back, she told him he was hurting her "… so he told me I need to Hit." Is she literally quoting him speaking about himself or is she explaining that he told her she needed to hit back. The word "so" implies an alternative; for example, he is hitting me **so** I need to hit him. Why didn't he complete the sentence and say "I need to hit ***you***?" These ambiguities are exactly why sufficient evidence is required. Inferences can be made, but they can just as easily be the wrong inference as the right ones. This is very dangerous ground.

Assuming arguendo that Brooks did mean that he needed to hit Grayson, the context still doesn't meet a verbal assault **in this case**. Grayson testified that he did not say anything, he just jumped on her. First he choked her, and then grabbed then board, then he hit her with the board, and *only after she spoke to him first did he speak back*. It is ludicrous to believe that a woman being choked, and then hit with a board was not already in fear of bodily injury until after he said "I need to hit." The hitting had commenced.

No other witness confirmed this threat. It was not in Officer Clayton Domel's statement that Brooks threatened her. It was not in Officer Sherer's statement that she had been threatened either. (R.R. Vol. 7, Def. Ex. 9) This falls

directly in line with the holding in *Hart* and the Appellate Court's finding that there needs to be more to rise to the level of meeting the statute.

IV. It Depends

When would the phrase "I need to hit" rise to the level of a verbal threat? Let's analyze this through the lens of the cases already cited. If I were to repeat those and substitute "I need to hit" with the threats in those cases, we would have these examples:

1. In *Wells* the record reflected actual death threats with May screaming "**I need to hit**" and telling Wells that he was going to shoot him with his gun. (emphasis indicates substitution of threat phrase). *Wells at* 2 – 4.

2. In *Pickens* the defendant made an express death threat saying "**I need to hit** n*****!" and then went to his vehicle to get a gun that he pointed at the victim. (emphasis indicates substitution of threat phrase). *Pickens at 2.*

3. In *Wilson,* the defendant told his father that "**I need to hit**" and then struck him on the head and back. (emphasis indicates substitution of threat phrase). *Wilson* at 134.

4. In *Tidwell* the defendant had a gun and told the victim that "**I need to hit.**" (emphasis indicates substitution of threat phrase). *Tidwell* at 775.

5. *Rogers v. State*, 877 S.W.2d 498, 500 (Tex.App.—Fort Worth 1994, pet ref'd), the defendant pulled out a knife and threatened "**I need to hit**." (emphasis indicates substitution of threat phrase).

All five of these examples support the phrase as a verbal threat. They are all spoken **prior** to any assault, which puts the potential victim squarely on notice that something bad is about to happen to them. These fact patterns would all put another in fear of imminent bodily injury. Conversely, in the case at bar, the phrase is spoken after the choking and after the board hitting is akin to putting sunscreen on after you are blistered, it's simply too late. Even stripping bare the ambiguities as to the meaning of the phrase itself in this case, it's a moot point. It's already happened. The nature of a threat is forward looking, as pointed out in the State's brief.

The State relied on *Olivas* to define what a threat is:

"The Court in *Olivas* noted that Webster's dictionary provided four definitions for the term threat. A threat is (1) to declare an intention of hurting or punishing, to make threats against; (2) to be a menacing indication of (something dangerous, evil, etc.), as the clouds threaten rain or a storm; (3) to express intention to inflict (injury, retaliation, etc.); or (4) to be a source of danger, harm, etc. to. *Olivas v. State*, 203 S.W.3rd 341, 345 (Tex. Crim. App. 2006).

A key word in these definitions is "intent". Merriam-Webster Dictionary lists multiple synonyms for intent, including but not limited to aim, ambition, end, goal, plan, target. (Merriam-Webster online dictionary, merriam-webster.com) All of these words are forward looking. By definition, threats cannot reach backward. This brings us full circle to the answer of whether "I need to hit" constitutes a verbal threat. In specific fact patterns it could constitute a verbal threat. In the case at bar it does not constitute a verbal threat because it occurred after the assault and, in the context of all the other evidence, it did not rise to the level of sufficiency needed to prove aggravated assault by threat.

CONCLUSION & PRAYER

Respondent Jessie Brooks prays that this Honorable Court uphold the finding of the 3rd Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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